IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 51.

FERDINAND FISWICK, JACOB F. MAYER, and FRITZ GUSTAV RUDOLPH,

vs.

THE UNITED STATES OF AMERICA.

REPLY BRIEF ON BEHALF OF PETITIONERS.

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In the brief filed for the United States in the above matter, the Government argues under its first point that the cause as to petitioner Fiswick is moot. Under the second point it argues that while it was error for the trial court to permit the jury to consider each "petitioner's" statements to the F. B. I. as evidence against the other "petitioners", it ignores the fact that the statements of the *other* defendants who were on trial were also admitted, and urges that the admission of petitioners' statements was harmless error. We feel that a short reply is necessary.

ARGUMENT.

I.

The cause is not moot as to petitioner Fiswick.

Fiswick, at the time he entered his plea on October 16th, 1944, was in the custody of the Attorney General on Ellis Island, New York, interned as an alien enemy and remained there. The trial started on November 27th, 1944, and Fiswick was produced in Court daily from Ellis Island. On December 21st, 1944, he was brought to Court from Ellis Island when he was sentenced to imprisonment for the term of eighteen months, and was placed in the custody of the Attorney General again, who had the power under the statute to designate the place of confinement, (Title 18, Sec. 753(f)) (R. 1-7). Fiswick was then sent from Ellis Island to the Federal House of Correction at Danbury, Connecticut, and the records will show that after he had served the term imposed by the Court he was not "unconditionally released" but was returned to Ellis Island, still in the custody of the Attorney General.

Subsequently, after hearings with respect to his status as an alien enemy, he was paroled but of course subject to be re-interned. Government records will confirm these statements.

Fiswick's cause is far from moot and is totally different from the case of *St. Pierre*, which is the case relied upon by the Government in urging this point, (*St. Pierre* v. *United States*, 319 U. S. 41). In that case St. Pierre had served a term of five months for criminal contempt of court

because of refusal to testify before a Grand Jury, and the writ of certiorari was granted after the service of the term.

In that case the Court in holding the cause to be moot stated:

> "Nor has petitioner shown that under either state or federal law further penalties or disabilities can be imposed on him as a result of the judgment which has now been satisfied."

The status of Fiswick is quite different because, as the Government concedes, under Title 8 U. S. C. Sec. 155, he may still be deported. This is certainly a further penalty which may be imposed if the conviction stands. Even if he should not be deported this conviction will certainly operate unfavorably when his pending application for citizenship is presented to the Court.

While it is true that Fiswick's "last entry" into the United States as set forth in the Government's brief was in 1937, he first came to the United States in January, 1929, and has lived here ever since, excepting for two short visits that he made to Germany in 1932 and in 1937, the first to see his sick father and the second, to visit his parents-in-law with his bride (R. 214, 215). We merely state this to show that he has resided in this country for many years.

II.

The error committed in the trial court was not harmless as urged by the Government in its brief nor have petitioners gone beyond the reasons presented for the writ in their argument.

As we have heretofore called to the attention of the Court in our brief, there were 31 defendants named in the indictment as well as 3 named as co-conspirators, the indictment was severed as to 14 of the defendants, 5 retracted and entered pleas of guilty and the indictment was moved as to 12 of the defendants. 1 retracted and entered a plea of guilty during the trial, and as to another the indictment was dismissed. The statements made by the 10 remaining defendants, including the 3 who appeal, were submitted to the jury, that is, the statements made by 7 others besides those of the 3 petitioners.

The Government complains that the argument which we have made in our brief goes beyond the questions presented when we applied for the writ of certiorari. The second question presented was as follows: Are statements made by defendants not in the presence of each other, and years after the commission of the last overt act charged in a conspiracy indictment, admissible to prove the existence of the conspiracy charged, and its continuance.

In the first point in our argument we have endeavored to show that the Government failed to prove the conspiracy charged.

In our second point we have endeavored to show that the admission of statements made by defendants on trial,

was not only improper for the purpose of proving the *corpus delicti* but also to prove the continuance of the conspiracy charged, down to the date of the filing of the indictment.

In our third point in urging that there was no proof of any intentional falsification in the original registration statements filed by all the defendants in 1940, we feel that this also goes to the question as to whether or not any conspiracy was proved at the trial.

The errors alleged in the charge of the trial court and its refusal to charge as set forth in our further points, are all bound up with the question as to whether or not there was a conspiracy either with or without the statements admitted in evidence, and how the jury should consider the matter in reaching a verdict after the Court had refused to direct a verdict.

The statements of defendants admitted in evidence should not be considered as harmless error. As we have attempted to show in our brief, either with or without them, there was insufficient proof to be submitted to the jury either of the conspiracy charged in the indictment or the continuance thereof.

We also contend that if this Court upholds the view that the statements herein referred to were improperly admitted by the trial court then in charging the jury the Trial Court erred not only in the charge made to the jury but also in the failure to charge as requested.

We urge that the decision in *Kotteakos* vs. *United States* cited in the Government's brief and reported in the advance sheets of the Law Edition in Vol. 90 page 1178, fully sup-

ports our contention that the admission in evidence of the statements made by petitioners and other defendants on trial cannot be considered harmless as no one can determine what effect they may have made upon the jury in reaching its verdict. So far as petitioner Fiswick's cause is concerned, if this Court holds that the statements referred to were improperly admitted, the lower courts, in obedience to the mandate of this Court, should direct a reversal of the judgment of the District Court and not direct a re-trial of the case.

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Attorney for and of Counsel with Appellants.